NO. 83-1574

IN THE

Supreme Court of the United States

October Term, 1984

CITY OF PERRYTON,

Petitioner,

vs.

DONALD W. JACKS and wife, BONNIE JACKS

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

From the United States Court of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Is the degree of specificity in jury instructions in a civil case sufficient reason to grant a Writ of Certiorari?
2. Was the jury misled in its understanding of the issues?
3. Can a Petitioner complain that a necessary instruction was omitted when he caused it to be omitted?
4. When a dangerous condition is traceable to the gas company's own act is a proof of notice of the specific defect necessary?

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STATEMENT OF THE CASE

This is a suit brought by Donald W. Jacks and his wife, Bonnie Jacks, to recover for personal injuries Mr. Jacks sustained on April 18, 1979.

Background Information.

Donald Jacks was the job superintendent for a construction company contracted to enlarge a drive-in bank facili-

ty in Perryton, Texas. Part of the expansion project required placing a large round corrugated steel culvert underneath the drive through area of the bank to enclose electrical lines and pneumatic tubes for the facility. Mr. Jacks had entered the seventy foot long culvert early the morning of April 18, 1979, to find out if water had accumulated in the culvert from the previous night's heavy rainfall. After Mr. Jacks walked most of the length of the darkened culvert and had started back toward the opening, he flipped on his lighter to see how much water had collected.

The Explosion.

There was an explosion, which knocked Mr. Jacks unconscious to the floor, and roaring flame. Mr. Jacks regained consciousness and saw blue flame roaring and coming toward him. He felt himself burning, shriveling up like a piece of bacon in a skillet. He crawled toward the end of the tunnel and hollered for help. He passed out as he was pulled from the culvert.

The Injury.

Mr. Jacks was burned severely about the face, arms, hands, chest and back. He suffered second and third degree burns to 64% of his body. He was in constant pain and heavily sedated. Skin was grafted on a number of places on his body. There were four separate hospitaliza-

tions and additional corrective surgeries. He underwent extensive and painful convalescence and rehabilitation. Bonnie Jacks trained and served as her husband's nurse and therapist.

Damages.

Before his injury Donald Jacks was in excellent health, strong as a bull, a hard worker, a virile and masculine man, a good father, a good provider, and a good husband. He had a high school education and one year of college. He was trained as a carpenter and was an excellent carpenter.

Since his injury and convalescence Mr. Jacks has attempted to do some carpentry work but is physically unable to do so. He can't grasp a hammer with his injured hands. His strength is diminished, his emotions and nerves are scarred as well as his body. He believes he is half the man he was. The pain has gotten worse — at night he can hardly sleep.

In 1978, the year before he was injured, Don Jacks made $22,000 as a job superintendent. He would have made $24,000 in 1979, $26,000 in 1980, and $30,000 in 1981. A construction superintendent in 1982 made between $30,000 and $40,000 a year. Don Jacks's income in 1980 was zero; his income in 1981 was zero. In 1982 his gross income was $6,138.00 from small carpentry jobs in which

his wife and son-in-law basically did all the carpentry work under his direction.

Negligence.

1. The six inch gas main in the alley adjacent to the drive-in bank facility where the explosion occurred had been in place since 1928. It was of uncoated steel. Coating the line will slow corrosion and electrolysis. Corrosion is general rusting and aging of a line. Electrolysis causes deterioration by focusing electrical current into the steel line at a point where it descends from the line to another destination.

2. Cathodic protection further combats deterioration caused by electrolysis. Cathodic protection is a procedure whereby sacrificial anodes of a highly conducive metal are installed on the gas line. These anodes allow electrical current to flow through the anode rather than the line, harmlessly directing the current out of the steel line thereby causing the corrosion in the anode instead of in the steel pipe.

3. Ben Street, the City Engineer and Director of Public Works, had been employed by the City for 17 years. He testified that he knew long before April of 1979 that the gas system had an electrolysis problem and that he knew a number of previous leaks in the system had been caused in part by electrolysis.

4. The City's gas system had been suffering gas losses for several years. From October of 1977 through September of 1978 the system lost 23% of its gas.

5. J.B. Wigham, the City Manager for thirty-two years, testified that it had been hard to control losses within the lines, that he had been wrestling with the gas losses before April of 1979, that the lines had experienced a problem with electrolysis for years, and that a cathodic protection system should have been installed years prior — long before it actually was installed in part of the system in 1978.

6. On April 18, 1979, after the explosion which injured Donald Jacks, a number of tests were begun and continued for at least sixty days, with retesting periodically thereafter. A number of surface test probe holes and test holes at the drive-in facility found natural gas all over the lot. Additionally, on the date of the explosion or shortly thereafter, the gas main was exposed and four or five leaks were discovered, some in the main in the alleyway adjacent to the drive-in facility.

7. The worst gas leak was found in a two-inch abandoned service line. Raymond McCurdy, who testified for Petitioner and was in charge of the gas department for the city until 1978, said that it was unwise to have failed to plug the abandoned line at the main, that when you

dead end a service line that way — at the end of it — electrolysis goes to work.

Notice.

1. The City knew the gas main located in the alley adjacent to the drive in facility was underneath a concave, paved alleyway which caused water to collect underneath the pavement and promoted rusting of the main.

2. The City knew the main was over fifty years old and was of uncoated steel which was especially subject to rust and corrosion.

3. The City knew the main was not cathodically protected. The City's own witnesses admitted that the four leaks found in the main were caused either totally or in part by electrolysis, that cathodic protection should have been installed years before, and that such protection would have substantially reduced the damage by electrolysis.

4. The City had previously abandoned the service line underneath the drive-in location at its end, knowing that when a line is abandoned in that manner electrolysis goes to work to corrode the line.

5. The City knew its system had experienced high gas losses and a number of leaks for a period of years.

SUMMARY OF THE ARGUMENT

Under the common sense approach to submission provided by our federal rules, the jury was fairly and adequately instructed that they were required to find the City knew or should have known that their system needed to be cathodically protected, maintained and repaired.

ARGUMENT FOR DENYING THE WRIT

Each answer to the four questions presented for review independently supports the conclusion that this case does not belong before the Supreme Court of the United States.

1. Is the degree of specificity in jury instructions in a civil case a sufficient reason to grant a Writ of Certiorari?

Historically the mode and nature of jury instructions in civil cases have been left to the judgment of the Circuit Courts of the United States. The Court has considerable discretion about the nature and scope of the issues to be submitted to the jury under Rule 49(a) so long as they present the case fairly. 9 Wright & Miller, *Federal Practice and Procedure*, §2506, 499. *Scott v. Isbrandtsen Co.*, C.A. 4th, 1964, 327 F.2d 113, 199. *Stacey v. Illinois Central Railroad*, C.A. 5th, 1974, 491 F.2d 542, 545.

"[T]he breadth and narrowness of the issues submitted is relevant to the degree of freedom permitted the jury. Federal courts have usually preferred a few broad questions." 9 Wright & Miller, *Federal Practice and Procedure*, §2506, 500. Likewise, the federal courts, besides avoiding the granulation of issues previously adhered to in Texas, has refused to draw technical distinctions between ultimate and evidentiary issues or questions which may be of both law and fact. 9 Wright & Miller, *Federal Practice and Procedure*, §2506, 500-502.

None of the typical reasons under this Court's Rule 17 for granting a writ of certiorari has been shown.

2. Was the jury misled in its understanding of the issues?

Petitioner complains of the following instruction:

> "In particular Plaintiffs (Jacks) allege that the City failed to install cathodic protection for its gas distribution system when it knew or in the exercise of ordinary care should have known that the system was being harmed by the process of electrolysis."

And Petitioner complains of the following issue:

> "Special Issue No. 1(a)
> "Do you find from a preponderance of the evidence that the Defendant City of Perryton was negligent in failing to timely install cathodic protection . . .?"

A combination of an instruction along with a special interrogatory as authorized by Rule 49a is the accepted mode for instructing a jury throughout the federal system. Even the mixing of a so-called general charge with a special interrogatory is a recognized practice. *Thrash v. O'Donnell*, C.A. 5th, 1971, 448 F.2d 886, 890.

What is the foregoing inquiry? What question is posed? Simply put, "Was cathodic protection timely installed?" The evidence was full and undisputed that cathodic protection was a method of minimizing and reducing the formation of corrosion and holes caused by the process of elec-

trolysis in gas lines. Electrolysis was undisputedly recognized as a cause of many of the leaks in the lines of the Petitioner. It was a known condition having existed for a number of years. It was the undisputed cause of a major leak in the alley adjacent to the bank tunnel where the explosion occurred.

How did the Court tell the jury they could determine whether installation of cathodic protection was timely? The Court made it crystal clear. To have been timely installed it would have been done at the time when the City knew or in the exercise of ordinary care should have known the system was being harmed by the process of electrolysis.

> What is the appropriate standard for review of the charge?
>
> " '[The] test is not whether the charge was faultless in every particular but *whether jury was misled* in any way and *whether it had understanding of the issues and its duty to determine those issues.*' Our jurisprudence mandates that we consider the charge as a whole, viewing in the light of the allegations of the complaint, the evidence, and the arguments of counsel." *Smith v. Borg-Warner Corp.*, 626 F.2d 384, 386 (5th Cir. 1980) (citations omitted; emphasis added), quoting *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1976, 1100 (5th Cir. 1973), cert. denied, 419 U.S. 869, 9f S.Ct. 127, 42 L.Ed.2d 107 (1974).

The standard for jury instruction is also adequately stated in the Court's opinion in *Sheib v. Williams-McWilliams Co., Inc.*, 628 F.2d 509 (5th Cir. 1980).

How can any analysis of the instructions concerning cathodic protection support any complaint that they were not clear or did not adequately inform the jury? They can not. The language is too simple. It is too straight forward and was susceptible of only one reasonable interpretation.

It is interesting to note that the Petitioner's brief before the 5th Circuit did not really attack the instruction concerning cathodic protection. Petitioner's only complaint at that level as to instruction concerned the failure to maintain or failure to replace the gas line.

In this case it is sufficient to impose liability upon the Petitioner for them to have committed one act of negligence which was a proximate cause of the injuries to the Respondent. That one act of negligence in failing to timely install cathodic protection was found by the jury, was upheld factually by the Fifth Circuit and was never really complained of as to the form of instruction or submission.

The Texas case cited by Petitioner as to the manner of submission of issues, *Scott v. Atchison T. & S.F. Co.*, 551 S.W.2d 740 (Tex. Civ. App.-Beaumont 1977, aff'd) 572 S.W.2d 273 (Tex. 1978), doesn't have anything to do with

the Federal Rule. The stultified, backward and archaic special issue submission procedure in Texas has largely been refuted even by Texas state courts. With the 1973 amendment of Texas Rules of Civil Procedure, many cases in Texas courts are now being submitted on a general charge with appropriate instructions. The obvious reasons for the changes are to enlighten the jury and not to blindfold them.

The submission of a separate issue of notice which Petitioner attempted to impose on this trial court is known in state court as a "distinct and separate submission." It never existed under the Federal Rules. The "distinct and separate submission" which Petitioner attempted to impose on the trial court is a thing of the past even in Texas Courts. *Brown v. American Transfer & Storage Co.*, Texas Sup. 1980, 601 S.W.2d 931, certiorari denied 101 S.Ct. 575, 449 U.S. 1015, 66 L.Ed.2d 474.

Petitioner has stated that by oversight a notice instruction was included in the charge. It may have been the Petitioner's oversight, but not the Court's. The Court well knew what it was doing.

3. Can Petitioner complain that a necessary instruction was omitted when Petitioner caused it to be omitted?

Originally the instruction as submitted by Respondents and accepted by the Court read as follows:

"Special Issue No. 1

> "Do you find from a preponderance of the evidence that the City of Perryton was negligent (a) in failing to install cathodic protection when it knew or in the exercise of ordinary care should have known that the system was being harmed by the process of electrolysis . . .?"

On the objection of the Petitioner to the inclusion of the language "when it knew or in the exercise of ordinary care should have known," the language *was removed from the issue* and the word "timely" used in its place. A party should not be allowed to complain on appeal of the omission of an instruction when it was removed at the party's request. See *1 Federal Jury Practice and Instruction*, 703; *Baumler v. State Farm Mutual Automobile Ins. Co.*, 493 F.2d 130 (9th Cir. 1974).

4. When a dangerous condition is traceable to the gas company's own act, is proof of notice of the specific defect necessary?

Respondents include the argument under this question in their brief so that no reply of Petitioner will distort the true requirement of notice that exists when it is the gas company's own line and not that of some third person. In such a case the gas company therefore has the duty to maintain, inspect and replace the same. It has never been

and the Fifth Circuit did not state that the law required notice of a specific leak under such circumstances. The only notice required is notice that a reasonable man would have cathodically protected the lines, maintained them better or replaced them.

Respondents Jacks say that of the duties to properly install, inspect and maintain and to timely respond to emergencies, only the latter requires actual or constructive notice. An operator of a gas distribution system cannot rely upon the integrity of an installed system and ignore it until disaster strikes. The condition of the main in the alley and of the abandoned service line did not develop overnight, or even over a period of weeks or months. The City itself abandoned the service line in a manner its employees testified was unwise and unsafe. There was a slowly developing deterioration which had taken years to develop and of which the City should have known because of the age of its gas system, its knowledge of gas leaks and gas losses, and its failure to timely install cathodic protection on the line. Additionally, because of the dangerous properties of gas and its propensity to get out of the confines of pipe, gas is known to escape and cause injury. The City had a duty to do such inspection and maintenance as would in the exercise of ordinary care prevent the escape of gas.

There is a legal duty for a gas company to inspect and maintain its gas pipelines to prevent the escape of gas. *Blassingame v. Lone Star Gas Co.*, 236 S.W.2d 526 (Tex. Civ. App.-Dallas 1950, no writ); *Lone Star Gas Company v. Veal*, 378 S.W.2d 89 (Tex. Civ. App.-Eastland 1964, writ ref'd n.r.e.); *Lane v. Community Natural Gas Co.* 123 S.W.2d 639 (Tex. 1939); *Prudential Fire Ins. Co. v. United Gas Corp.*, 199 S.W.2d 767 (Tex. 1946).

Likewise, it is a majority rule:

> "With respect to the necessity of proof that the gas company had notice of the dangerous condition existing which caused gas to escape from its mains in the street, there are two rules of fundamental significance. The first of these is that where the dangerous condition is traceable to the gas company's own act — that is, a condition created by it or under its authority — or is a condition in connection with which the gas company is shown to have taken action, no proof of notice is necessary." (The second rule is quoted in Appellant's brief.) Annot., Liability of Gas Company for Personal Injury or Property Damage caused by Gas Escaping from Mains in Street. 96 ALR2d 1007, 1020 (1964).

Texas law is equally direct:

> "In the operation of the business a party is bound to exercise that degree of care and diligence as to avoid injury to his customers by the escape of gas while it is being carried through his pipes

. . . (I)n view of the highly dangerous character of gas and its tendency to escape, a gas company must exercise a degree of care to prevent damage commensurate to the danger which it is its duty to avoid. 38 *(CJS Gas)* §42. Not only must a gas company see that its pipes and other service facilities are properly laid and functioning at the time of their installation, so that gas will not escape therefrom, but, because of the dangerous character of the commodity, the company must maintain such a system and inspection as will insure reasonable promptness in the detection of any leak that may occur through deterioration of materials used; . . ." *Blassingame v. Lone Star Gas Co.*, 236 S.W.2d 526, 529 (Tex. Civ. App.-Dallas 1950, no writ) quoting and citing *Lane v. Community Natural Gas No.*, 123 S.W.2d 639 (Tex. 1939).

CONCLUSION

Respondents Donald W. Jacks and wife, Bonnie Jacks, pray that the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies of the foregoing *Brief in Opposition to Petition for Writ of Certiorari* were mailed on this day to attorney of record for Petitioner City of Perryton, Otis C. Shearer, Lemon, Close, Shearer, Ehrlich & Brown, P.O. Box 1066, Perryton, Texas 79070.

DATED the _____ day of April, 1984.

_____

Robert L. Templeton